83-1011

No. 83-

In The

Supreme Court of the United States

October Term, 1983

JON OLSON, Petitioner

v.

STATE OF GEORGIA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

ALBERT M. PEARSON, III
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Counsel of Record for Petitioner

December, 1983

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QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS OF GEORGIA MISAPPLIED THE "OPEN FIELDS" DOCTRINE OF HESTER v. UNITED STATES, 265 U.S. 57 (1924) BY RULING THAT THE WARRANTLESS ENTRY AND SEARCH OF PETITIONER'S PROPERTY WERE NOT SUBJECT TO FOURTH AMENDMENT RESTRICTIONS BECAUSE THEY TOOK PLACE BEYOND THE CURTILAGE OF PETITIONER'S RESIDENCE?

2. ASSUMING PETITIONER'S ARREST VIOLATED THE FOURTH AMENDMENT, WERE PETITIONER'S POST-ARREST STATEMENTS AND INCRIMINATING ACTIONS THE PRODUCT OF THE CONTINUING EFFECTS OF THAT ARREST WHERE PETITIONER:

    a. REPEATEDLY ASKED TO SPEAK TO COUNSEL;

    b. WAS HELD 24 HOURS BEFORE HE WAS ALLOWED TO MAKE A PHONE CALL; AND

    c. WAS PERMITTED TO MAKE HIS FIRST PHONE CALL ONLY AFTER AGREEING TO LEAD LAW ENFORCEMENT OF-

FICIALS OVER HIS PROPERTY TO

THEN UNDISCOVERED CACHES OF

MARIJUANA?

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No. 83

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PETITION FOR A WRIT OF CERTIORARI
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OF THE STATE OF GEORGIA

Jon Olson respectively petitions this Court to issue a writ of certiorari to review the judgment of the Court of Appeals of the State of Georgia entered March 16, 1983. This petition comes after the Supreme Court of Georgia on November 2, 1983, vacated its initial order granting certiorari to that Court.

OPINIONS BELOW

The opinion of the Court of Appeals of Georgia (A-4) is reported at 166 Ga. App. 104. The trial court made oral findings of fact and conclusions of

law at a fourth amendment suppression hearing and granted petitioner's motion to suppress in part and denied it in part (A-28). The trial court entered a suppression order on February 4, 1982 (A-25).

JURISDICTION

The judgment of the Court of Appeals of the State of Georgia was entered on March 16, 1983 (A-4). A timely petition for rehearing was denied on March 31, 1983 (A-3). Thereafter, a timely petition for certiorari was filed on April 20, 1983 with the Supreme Court of Georgia. On June 22, 1983 the Supreme Court of Georgia granted Olson's petition for certiorari (A-2). After oral argument, the Supreme Court of Georgia on November 2, 1983 entered an order vacating its prior decision to grant certiorari (A-1). Jurisdiction of this Court to review the judgment of the Court of Appeals of the State of Georgia is conferred by 28 U.S.C. §1257(3).

STATEMENT OF CASE

Petitioner was indicted on January 4, 1982 for trafficking in marijuana in violation of OCGA §16-13-31(c). Prior to trial, petitioner moved to suppress the marijuana taken from his property and several incriminating statements that he made on the ground that all had been obtained in violation of the fourth amendment or as a direct result of an exploitation of such a violation. According to petitioner, the fourth amendment violation occurred on September 3, 1981, when law enforcement officials conducted a warrantless entry upon and search of petitioner's rural, wooded, fenced, 400 acre tract of property. They discovered marijuana in a yard near one of petitioner's two houses. This warrantless intrusion led to a warrantless search of petitioner's van. It, too, yielded marijuana. Afterwards, law enforcement officials armed with this information obtained a search warrant for the two houses on petitioner's property and conducted a search of both houses and the adjacent grounds. Only a small part of petitioner's property was searched on September 3, 1981.

Despite asking repeatedly to call his attorney, petitioner was held incommunicado overnight in the Coweta County, Georgia jail.[1] The next day, despite further pleas to talk to his attorney, petitioner led law enforcement officials on a tour of his property during which he disclosed the location of many caches of marijuana which they had not found during their previous two incursions into petitioner's property.

The trial court granted petitioner's motion to suppress in two respects: (1) law enforcement officials lacked probable cause to search the van; (2) they also lacked probable cause to search the house on petitioner's property which served as his personal residence. All marijuana and evidence seized during the course of those two searches was suppressed. The remaining evidence from the search of petitioner's property was ruled admissible (A-25 to A-29). This included marijuana observed underneath a black plastic sheet near the second house on petitioner's

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[1]These facts raise a question under Edwards v. Arizona, 451 U.S. 477 (1981). The issue was raised at the pretrial suppression hearing, but, for reasons that must be left to a federal habeas corpus hearing, the argument was abandoned before the Court of Appeals.

property (not the personal residence). This evidence came to light during the initial, warrantless entry into petitioner's property and provided the basis for all further searches. It is the "poisonous tree" in this case. As a result of this tainted source, law enforcement officials discovered marijuana in petitioner's second house (the unoccupied house) and at various locations throughout the entire 400 acres of his property.

The trial court justified admitting the bulk of the evidence challenged by petitioner on two theories: (1) the marijuana was found outside the curtilage of petitioner's residence and therefore came within the open fields doctrine; and (2) even if the search of petitioner's property and his arrest violated the fourth amendment, petitioner's statements and actions leading to the discovery of additional marijuana on September 4, 1981 (the second day) were so clearly the product of free will that they were purged of the taint of any prior illegalities.

Petitioner was convicted of trafficking in marijuana on March 11, 1982 and sentenced to 20 years imprisonment and fined $25,000. He appealed his con-

viction to the Court of Appeals of the State of Georgia and on March 16, 1983, that court affirmed his conviction in all respects except sentence which was reduced from 20 to 10 years. Petitioner filed a timely motion for rehearing and that motion was denied on March 31, 1983. Thereafter, as indicated above, petitioner filed a timely application for writ of certiorari to the Supreme Court of Georgia. After first granting the application to consider only petitioner's argument concerning the open fields doctrine, the Supreme Court of Georgia on November 2, 1983 reversed its position and vacated the grant of certiorari. Petitioner did not move for a rehearing. Effectively, therefore, petitioner seeks a writ of certiorari to review the decision of the Court of Appeals of the State of Georgia since it is the highest court in this jurisdiction to have actually rendered a judgment on the merits of petitioner's claim.

REASONS FOR GRANTING WRIT OF CERTIORARI

This case presents important questions concerning the scope of the "open fields" and "fruit of the poisonous tree" doctrines.

The "open fields" doctrine originated in Hester v. United States, 265 U.S. 47 (1924) when property concepts such as trespass and curtilage played a more important role in determining fourth amendment protections than today. In major part, because of the Supreme Court's decision in United States v. Katz, 389 U.S. 347 (1967), the criteria for determining when fourth amendment protections apply has changed. The impact of this change has never been dealt with in depth by this Court. The one post-Katz decision involving the open fields doctrine, Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861 (1974), reaffirmed Hester, but the facts in that case did not necessitate discussion of whether Katz might have narrowed the scope of Hester under certain circumstances

This case presents precisely that question. It involves a warrantless law enforcement entry upon

petitioner's property, a large (400 acres), thickly wooded tract from which the public was excluded. Petitioner's intent to exclude was manifested by: (1) a wire fence surrounding the property; (2) approximately 50 to 100 no-trespassing signs on the boundaries; and (3) an access road that was blocked by a gate and was marked with no-trespassing signs. Although the law enforcement officials who made the initial warrantless entry and search testified that they saw neither the fence nor the no-trespassing signs, they were led on to the property by an informant who had been on the property before. That informant had previously entered the property as a trespasser and he led them on to the property by the same clandestine route through the woods that he had used.

The Court of Appeals of Georgia took the position that the "open fields" doctrine of Hester survived Katz completely intact. If law enforcement investigative activity occurs outside the common law curtilage of the home, there is per se no reasonable expectation of privacy. Olson v. State, 166 Ga. App. 104 (1983). See also LoGuidice v. State, 164 Ga. App. 709 (1982); Giddens v. State, 156 Ga. App. 258 (1980).

It doesn't matter what the individual does to exclude the public or to manifest his desire to be left alone.

Petitioner believes that Georgia's per se approach to the "open fields" doctrine is incompatible with Katz which requires a more flexible approach toward determining fourth amendment protections. Katz, thus, does not overrule Hester, but rather in a small number of cases at the margin might dictate a different outcome than is derived by reliance on the formalistic curtilage test. Petitioner's case falls into that small group. Given the division of authority in this country on the Hester and Katz relationship, Supreme Court clarification would be highly desirable.

This Court presently has before it three cases which are factually similar to petitioner's and which will require the Court to explore the possibility that Katz limits the scope of Hester. Florida v. Brady, ___ U.S. ___, 102 S. Ct. 2266 (1982); Oliver v. United States, ___ U.S. ___, 103 S. Ct. 812 (1983); Maine v. Thornton, ___ U.S. ___, 103 S. Ct. 1520 (1983). Petitioner urges this Court either to grant certiorari to consider this question along with the

three cases now pending or to withhold action on this petition until decisions in those cases are handed down. If those decisions benefit petitioner, this Court can then grant this petition for certiorari or remand the case to the Court of Appeals of Georgia for further consideration.

The "fruit of the poisonous tree" doctrine arose in this case as an independent ground for the decision of the Court of Appeals (A-12). In order to formulate this issue with precision, one must assume that petitioner's arrest violated the fourth amendment for at least one of the following reasons: (1) the initial warrantless entry on to his property by law enforcement officials and the resulting discovery of marijuana under a black plastic sheet; or (2) the warrantless search of petitioner's van -- which the trial judge in fact found to be illegal. One must also recall that petitioner was taken into custody immediately after the illegal search of his van. None of the trial accounts of this episode disputes that petitioner at that time asked to speak to his attorney. Nor was it disputed that petitioner repeated that request several times during the next

24 hours. Petitioner was held incommunicado for that entire period and was permitted a phone call to his attorney only after he had incriminated himself by statements and by leading law enforcement officials on a tour of his property to show them hidden caches of marijuana.

At trial, the court held a Jackson-Denno type hearing which focused on the admissibility of petitioner's statements. The court confined itself to a determination that the statements were voluntary and held that they were obtained in compliance with the constitution. The trial court misconceived the question. Voluntariness is a factor to be considered under Wong Sun v. United States, 371 U.S. 471 (1963) and later cases, but it is not decisive. A range of factors must be considered to determine whether a statement or evidence has been obtained as a result of the continuing effects of an illegal arrest. The trial court's focus on voluntariness meant that it overlooked the significance of (1) the intimidating circumstances of petitioner's arrest; (2) the 24 hour incommunicado detention; and (3) most signifi-

cant of all, petitioner's repeated requests to speak to his attorney.

Although the Supreme Court in recent years has clarified some aspects of the "fruit of the poisonous tree" doctrine, see, e.g., Florida v. Royer, ___ U.S. ___, 103 S. Ct. 1319 (1983); Taylor v. Alabama, ___ U.S. ___, 102 S. Ct. 2664 (1982); Rawlings v. Kentucky, 448 U.S. 98 (1980); Dunaway v. New York, 442 U.S. 200 (1979); and Brown v. Illinois, 422 U.S. 590 (1975), it has never specifically considered the weight to be given a request for counsel under the circumstances of an illegal arrest. In the context of custodial interrogation, where the arrest is lawful and there is a request to speak to counsel, this Court has held that before an inculpatory statement is admissible the state must show that the right to counsel was specifically waived. Edwards v. Arizona, 451 U.S. 477 (1981). It would be anomalous in the extreme if in the Wong Sun illegal arrest situation, the state's burden of proof with respect of waiver of counsel were less demanding than when the arrest is valid.

Petitioner's case is an appropriate one for clarifying the weight to be given under the Wong Sun line of cases to the state's failure to honor a suspect's request for counsel during or after illegal arrest or search. Granting that this failure might be considered as going to the overall flagrancy of law enforcement conduct, a unitary standard under the fourth, fifth and sixth amendments concerning requests for counsel would seem sounder than merging a suspect's request for counsel into the range of considerations relevant to chain of causation under the "fruit of the poisonous" tree doctrine.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals of the State of Georgia entered on March 16, 1983.

Respectfully submitted,

Albert M. Pearson, III

Albert M. Pearson
Counsel for Petitioner

December, 1983

APPENDIX

39898.

SUPREME COURT OF GEORGIA

Atlanta, Nov. 2, 1983

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

OLSON v. THE STATE.

After plenary consideration of this matter, it is found not to satisfy the criteria for the grant of certiorari and the writ is therefore vacated. All the Justices concur, except Smith, J., dissents.

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Hazel E. Hallford, Deputy Clerk
(Signature)

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

ATLANTA June 22, 1983

Dear Sir:

Case No. 39898. JON OLSEN (sic) v. THE STATE.

The Supreme Court today granted the writ of certiorari in this case. All the Justices concur. This case will be assigned to the September 1983, Oral Argument Calendar.

The Court is particularly concerned with the following:

Scope of the "open fields" doctrine.

Briefs filed in the Court of Appeals are included in the record presented to this court. Additional briefs are not required but may be submitted.

Very truly yours,

Joline B. Williams, Clerk

COURT OF APPEALS
OF THE STATE OF GEORGIA

ATLANTA, March 31, 1983

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed;

64882 Jon Olson v. The State

Upon consideration of the motion for a rehearing filed by Appellant in this case, it is ordered that it be hereby denied.

COURT OF APPEALS OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA Mar. 31, 1983

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Alton Hawk, Clerk.
(Signature)

Mar. 16, 1983

64882. OLSON v. THE STATE.

CARLEY, Judge.

Appellant was convicted of trafficking in marijuana in violation of OCGA §16-13-31(c) and sentenced to 20 years' imprisonment with an accompanying $25,000 fine. He challenges on appeal the partial denial of his motion to suppress the marijuana found on his property, the admission of statements made by appellant at the time of and shortly after his arrest, the admission of evidence concerning the weight of the marijuana confiscated from his property, and the legality of the 20-year sentence.

1. On September 3, 1981, Officers Boddie and Cox of the Palmetto City Police Department received a tip that three fields of marijuana were growing on appellant's property, a 400-acre tract in Coweta County. The officers and the informer proceeded to an apparently abandoned house located on appellant's property. Boddie testified that they crossed a portion of appellant's property before reaching the

house, but that he was not sure at the time where appellant's property line was located and that he saw no signs or fences demarking the property.

Upon their arrival at the abandoned house, Cox located a large amount of suspected marijuana lying under a plastic sheet in the front yard. Boddie left Cox at the scene and met Officer Thompson of the Coweta County Sheriff's Department near a gated, dirt road entering the property. While positioned near the gate, Boddie and Thompson received a radio message from Cox indicating that some unidentified vehicles had pulled up to the abandoned house, that an unidentified person had moved the suspected marijuana, and that the vehicles were leaving the house. Within two to four minutes, two vehicles, including a van being driven by appellant, reached the gate at which Thompson and Boddie were located. Thompson halted the van, spoke with appellant, and shortly thereafter arrested appellant. A search of the van revealed a large quantity of marijuana. Appellant was taken to Coweta County Jail where he was detained throughout the night of September 3.

After arresting appellant, Thompson obtained a search warrant for appellant's property. A search

of the abandoned house and appellant's residence, located approximately one-half mile from the abandoned house, revealed additional marijuana located in both structures.

On September 4, 1981, Thompson, accompanied by appellant, again searched the premises. Appellant led Thompson to three separate marijuana fields, each of which was well hidden behind plum thickets. Thompson confiscated the marijuana growing in two of the fields. Appellant also led Thompson to a large quantity of marijuana stored in five barrels within a shed near the abandoned house.

Appellant moved to suppress all of the marijuana found on his property and in his vehicle. The trial court granted the motion as to the marijuana found in his residence and vehicle but denied the motion as to the marijuana obtained pursuant to the warrant from the abandoned house, from a shed near the abandoned house, and from the fields. Appellant challenges this partial denial of his motion.

Appellant argues that all of the marijuana seized was the result of an illegal search and is thus tainted and inadmissible under the exclusionary rule.

See Mapp v. Ohio, 367 U.S. 643 (81 SC 1684, 6 LE2d 1081) (1969); Katz v. United States, 389 U.S. 347 (88 SC 507, 19 LE2d 576) (1967). Appellant's position is premised upon an assertion that he had a reasonable expectation of privacy in the abandoned house and its curtilage, wherein marijuana was first spotted by Cox, that the warrantless "search" of the property surrounding the abandoned house based upon the informant's tip was illegal, and that the warrant obtained later was based solely upon this illegally-obtained information. In response, the state argues that the initial visit by Broddie and Cox to the abandoned house was justified under the "open fields" doctrine enunciated in Hester v. United States, 265 U.S. 57, 59 (44 SC 445, 68 LE 898) (1924). See Giddens v. State, 156 Ga. App. 258 (1) (274 SE2d 595) (1980).

"[C]onstitutional guarantees of freedom from unreasonable search and seizure, applicable to one's home, refer to his dwelling and other buildings within the curtilage but do not apply to open fields, orchards or other lands not an immediate part of the dwelling site." Bunn v. State, 153 Ga. App. 270, 272

(265 SE2d 88) (1980). It is not the physical character of a structure that determines whether it is a "dwelling"; rather, it is the actual habitation of a structure that makes it a "dwelling." See LoGiudice v. State, ___ Ga. App. ___ (___ SE2d ___) (Case No. 65263, decided November 22, 1982). "[T]he Fourth Amendment protects people, not places." Katz v. United States, 389 U.S. 347, 351, supra. "A dwelling place, whether flimsy or firm, permanent or transient, is its inhabitant's unquestionable zone of privacy under the Fourth Amendment, for in his dwelling a citizen unquestionably is entitled to a reasonable expectation of privacy." Kelley v. State, 146 Ga. App. 179, 182-183 (245 SE2d 872) (1978). Thus, an inhabited tent constitutes a "dwelling" with a "curtilage." Id., p. 183. However, an uninhabited house, though more similar in physical nature to a "dwelling" than a tent, does not constitute a "dwelling" for Fourth Amendment purposes.

The uninhabited house in question was located on a tract of land containing an inhabited house. However, the two houses were approximately one-half mile apart, and one could not be seen from the other.

"While the proximity of the outhouse to the mansion or dwelling-house is not the only fact to be considered, yet it is a very important factor in determining the question [of whether the outhouse is within the curtilage], and the outhouse, although it may be used for domestic purposes, must be near enough to the dwelling-house to be protected by the occupants of the latter from trespassing of any sort." Wright v. State, 12 Ga. App. 514, 518 (77 SE 657) (1913). Thus, in Wright, the smokehouse "two or three hundred yards from the dwelling house" was not considered part of the curtilage. Likewise, in the present case, the record amply supports the finding that the abandoned house and its surrounding property were not part of the curtilage of appellant's residence. "[The trial judge's] finding[s] on a motion to suppress must not be disturbed by this court if there is any evidence to support [them]." Vines v. State, 142 Ga. App. 616, 617 (234 SE2d 17) (1977). Consequently, the trial court correctly concluded that the sighting of the marijuana under the plastic cover in the yard of the abandoned house was authorized pursuant to the "open fields doctrine."

Appellant argues, however, that he had a reasonable expectation of privacy in the area around the abandoned house, irrespective of whether it was part of the curtilage of his residence. However, the officers testified that they did not see any "no trespassing" signs or fences blocking their entry on to the property. According to Boddie's testimony at the motion to suppress hearing, "[t]he officers received no notice prior to their entry that the owner or rightful occupant forbade such entry." Giddens v. State, supra, p. 259. Consequently, despite conflicting evidence, the trial court was authorized in concluding that the facts demonstrated that appellant had no reasonable expectation of privacy in the area where the marijuana was first discovered. Giddens, supra; LoGiudice, supra.

2. The search warrant issued on September 3, 1981, upon the affidavit of Thompson, which stated that probable cause was based primarily upon "[i]nformation received from a fellow police officer . . . that a large amount of suspected marijuana was being stored in and about the premises. Officer Boddie received the information within 24 hours of 9-3-81."

The "above premises" was described as that leased by appellant, and the warrant contained the address of appellant's house as well as a description of the route to the property. Also listed as property to be searched was "another woodframe house." The item to be seized was listed as "marijuana." The affidavit clearly was sufficient to authorize the issuance of the search warrant. Caffo v. State, 247 Ga. 751 (2) (279 SE2d 678) (1981); Cunningham v. State, 133 Ga. App. 305, 309 (211 SE2d 150) (1974).

Nevertheless, appellant attacks the warrant on the ground that the information relied upon was insufficient since Cox's intrusion upon the premises was illegal. However, we have already determined that Cox had a right to be where he was so as to make his observations. See Divisions 1 and 2 above. Appellant also attacks the warrant on the ground that the abandoned house was not described with sufficient specificity. "The description of the premises to be searched is sufficient if a prudent officer executing the warrant is able to locate the premises definitely and with reasonable certainty." McNeal v. State, 133 Ga. App. 225, 227 (211 SE2d 173) (1974).

Thompson testified that he was very familiar with appellant's property and knew the location of the abandoned house. Finally, we find that the warrant contained no technical irregularity "affecting the substantial rights of [appellant]." OCGA §17-5-31. The warrant in the present case was legally sufficient and the trial court did not err in denying those portions of appellant's motion to suppress relating to the marijuana admitted at trial.

3. After a Jackson-Denno hearing at which the trial court ruled that appellant's statements were "made in compliance with the Constitution of the United States and the Constitution of the State of Georgia," Thompson was allowed to testify at trial regarding statements made by appellant at and near the time of his arrest. Appellant, arguing that his arrest was without probable cause and therefore, illegal, asserts that any concurrent or subsequent statement made by him was the fruit of the illegal arrest and inadmissible. See United States v. Crews, 445 U.S. 463 (100 SC 1244, 63 LE2d 537) (1980); Wong Sun v. United States, 371 U.S. 471 (83 SC 407, 9 LE2d 441) (1963).

"The question whether a confession is the product

of a free will under Wong Sun must be answered on the facts of each case . . . The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, [cit.] and, particularly, the purpose and flagrancy of the official misconduct are all relevant. [Cit.] The voluntariness of the statement is a threshhold requirement. [Cit.] And the burden of showing admissibility rests . . . on the prosecution." Brown v. Illinois, 422 U.S. 590, 603 (95 SC 2254, 45 LE2d 416) (1975).

We are bound by the trial court's findings as to credibility arising from a Jackson-Denno hearing unless they are clearly erroneous (Rachel v. State, 247 Ga. 130, 133 (274 SE2d 475) (1981)), and the evidence adduced at the hearing supported the following concerning appellant's arrest and statements: Two to four minutes after receiving word from Cox that vehicles were leaving the scene of the abandoned house with suspected marijuana, Thompson stopped ap-

pellant's van at a gated, dirt road leading from the property. Thompson told appellant, whom he knew personally to be the owner of the property, to get out of the van. He identified himself and explained his presence on appellant's property. Appellant then stated that he suspected marijuana was growing on his property and that he wanted to make a deal for information concerning the person who was responsible for the marijuana. Thompson then requested permission to search appellant's property, at which time appellant stated that he would like legal advice or counsel. Thompson then read appellant his Miranda warnings, which appellant acknowledged and understood. Appellant was then placed under arrest and taken to the sheriff's office, where he requested to talk with Thompson. After again receiving Miranda warnings, appellant informed Thompson that "people in Atlanta" were growing marijuana on his property. Appellant stated that he had helped harvest some marijuana and helped move it into the abandoned house. Thompson and appellant discussed "the men in Atlanta bringing the marijuana down and looking for a place to bury the marijuana," and appellant made reference to marijuana being grown behind the house.

Thompson obtained the search warrant. Appellant remained in detention the night of September 3. The next day appellant again received Miranda warnings and agreed to walk Thompson around the property. During the tour of the property, appellant led Thompson to three marijuana fields and five barrels of marijuana stored in a shed adjacent to the abandoned house.

Under these facts, some of which conflicted with appellant's testimony at the hearing, but all of which were supported by the evidence, the trial court was authorized to conclude that appellant's statements and actions were both voluntary and acts of free will so as to purge the alleged taint of the alleged illegal arrest. Brown v. Illinois, 422 U.S. 590, supra. In Rawlings v. Kentucky, 448 U.S. 98, 106-110 (100 SC 2556, 65 LE2d 633) (1980), the majority opinion upheld the admissibility of the defendant's statement admitting ownership of drugs despite the fact that the statement was made at a time when he was being illegally detained. The opinion emphasized the following factors in reaching its conclusion: (1) Miranda warnings were given moments before the statement;

(2) the defendant was detained in a congenial atmosphere; (3) the statement apparently was a spontaneous reaction to the discovery of his drugs; (4) the statement clearly was voluntary; and (5) the absence of purposeful and flagrant misconduct on the part of the detaining officers. As to the importance of the latter factor, see Thompson v. State, 248 Ga. 343 (285 SE2d 685) (1981). The evidence supports a finding that each of these five factors were present to some degree in this case. Unlike Taylor v. Alabama, ___ U.S. ___ (102 SC ___, 73 LE2d 314) (1982), Dunaway v. New York, 442 U.S. 200 (99 SC 2248, 60 LE2d 824) (1979) or Brown v. Illinois, supra, the facts of this case justify the trial court's conclusion that the admission of the statements did not abridge appellant's constitutional rights, as they were made freely and voluntarily and constituted acts of free will unaffected by any alleged illegality in the detention of appellant. In so holding we do not intimate, however, that the initial stop and subsequent arrest of appellant was illegal, only that even if it were, his post-arrest statements were not erroneously admitted. In light of the above discussion, we need not reach the issue of the legality of appellant's arrest.

4. Appellant objects on two grounds to the admission of Thompson's testimony regarding the weight of the marijuana (389 lbs.) contained in the barrels which were introduced into evidence.

First, appellant argues that the state did not comply with OCGA §17-7-211(c) in that it failed to produce a written scientific report on the weight of the marijuana. Appellant relies on Tanner v. State, 160 Ga. App. 266 (287 SE2d 268) (1981). However, the record establishes that no written report regarding the weight of the marijuana ever existed. OCGA §17-7-211(c) applies only to "any written scientific report" (emphasis supplied) and does not serve to exclude testimony where no such report was in the possession of the state. See Billings v. State, 161 Ga. App. 500 (3) (288 SE2d 622) (1982). Although it might be argued that to permit the introduction of this evidence in this case will be precedent for the state deliberately to instruct witnesses not to prepare reports otherwise discoverable pursuant to OCGA §17-7-211(c), there is no evidence suggesting bad faith on the part of the prosecution in this case. See Billings, supra. In fact, Thompson testified on

cross-examination that he had informed defense counsel prior to trial of the weight of the marijuana. This enumeration is without merit.

Appellant's second objection to Thompson's testimony concerning the weight of marijuana is based on a hearsay ground. Thompson testified that the marijuana was weighed on a scale that had recently been marked certified, but that he had no personal knowledge concerning the calibration of the scale. It appears that Thompson's testimony regarding the weight of the marijuana was based on his own personal knowledge and did not "rest mainly on the veracity and competency of other persons." OCGA §24-3-1. A witness may testify regarding a measurement he made personally. Dyson v. Sellers, 24 Ga. App. 411 (100 SE 791) (1919). Compare Taylor v. State, 144 Ga. App. 534 (2) (241 SE2d 590) (1978). Any evidence relating to the reliability of the scale used to weigh the marijuana, which was brought out on cross-examination, went solely to the weight and credibility of Thompson's testimony and was a matter for the jury.

5. The final enumeration of error challenges the legality of the 20-year sentence. Appellant

urges that a maximum sentence of 10 years is provided for those convicted of selling, manufacturing, growing, or possessing a quantity of marijuana in excess of 100 pounds but less than 2,000 pounds.

"Crimes are punishable by the laws in existence at the time of their commission." Gibson v. State, 35 Ga. 224 (1) (1866). Unfortunately, the relevant statute in effect on September 3, 1981 (former Code Ann. §79A-811 (1) (Ga. L. 1980, pp. 432, 435)), appears to be neither clear nor complete. That statute, insofar as it is relevant to appellant's sentence, provided: "Marijuana. (1) It is unlawful for any person to possess, have under his control, manufacture, deliver, distribute, dispense, administer, sell, or possess with intent to distribute marijuana. (2) Except as otherwise provided in this subsection . . ., any person who violates this subsection shall be guilty of a felony and shall be punished by imprisonment for not less than one year nor more than ten years. (3) Any person who knowingly sells, manufactures, grows, delivers, or brings into this State, or who is knowingly in actual possession of, in excess of 100 pounds of marijuana shall be guilty of the felony of 'Trafficking in Marijuana.' If the quantity of mari-

juana involved: (a) Is in excess of 100 pounds, but less than 2,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of five years and to pay a fine of $25,000 . . ." (Emphasis supplied.)

In sentencing appellant to twenty years, the trial court, in effect, construed former Code Ann. §79A-811 (1) (3) as setting no maximum penalty for trafficking in marijuana. However, it is our duty to construe penal statutes "strictly against the state and liberally in favor of human liberty. [Cits.]" Curtis v. State, 102 Ga. App. 790, 801-802 (118 SE2d 264) (1960). "'[W]here any uncertainty develops as to which penal clause is applicable, the accused is entitled to have the lesser of two penalties administered.' [Cit.]" Hartley v. State, 159 Ga. App. 157, 162 (282 SE2d 684) (1981). When all subsections of former Code Ann. §79A-811(1) are read in conjunction with one another, as the statute clearly indicates they should, subsection (1)(3)(a) of that former statute would authorize only a maximum sentence not to exceed ten years. This follows from the fact that, although former Code Ann. §79A-811(1)(3)(a) did provide "otherwise" as to the

mandatory "minimum" sentence for the crime appellant committed, a maximum penalty for that crime was not "otherwise provided" therein. Although this omission of a maximum penalty was rectified in 1982 (see OCGA §16-13-31(f), since former Code Ann. §79A-811(1)(2) stated that, "[e]xcept as otherwise provided in this subsection [former Code Ann. §79A-811(1)," a violation of that subsection "shall" be punishable by imprisonment for not "more than ten years" and subsection (1)(3)(a) did not "otherwise" provide for the imposition of a sentence greater than ten years, the maximum sentence imposable against appellant for violating former Code Ann. §79A-811(1)(3)(a) would be ten years.

Accordingly, appellant's twenty-year sentence must be reversed and the case remanded to the trial court with direction that appellant be resentenced to a term of imprisonment not less than five years but not greater than ten years.

6. For the reasons discussed above, appellant's conviction is affirmed and his sentence is reversed with direction.

Judgment affirmed as to conviction and reversed and remanded as to sentence. Quillian. P.J.,

McMurray, P.J., Banke and Sognier, JJ. concur.

Shulman, C.J., Deen, P.J., Birdsong and Pope, JJ. dissent.

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OLSON v. THE STATE.

SHULMAN, Chief, Judge, dissenting.

Although I fully concur in the result and reasoning of the first four divisions of the majority opinion, I respectfully must dissent to the statutory analysis set forth in Division 5. I believe Code Ann. §79A-811(1)(3) (OCGA §16-13-31(c)(1)) to be clear in its mandate that trafficking in marijuana shall carry the increased, minimum sentences specified and that the 10-year limitation imposed by Code Ann. §79A-811(1)(2) (OCGA §16-13-30(j)(2)) shall not apply to the trafficking provisions. I reach this conclusion on the basis of the clear and unambiguous wording of those penalty provisions.

I do not agree with the majority's conclusion that the trafficking penalties applicable to this case are unclear. Code Ann. §79A-811(1)(2) is limited by the proviso: "Except as otherwise provided in this subsection . . ." The subsection then goes on to specify a one to 10-year sentence for possession of marijuana. Code Ann. §79A-811(1)(3) clearly provides otherwise: trafficking brings a minimum five, 10, or 15-year

sentence depending upon the weight of the marijuana seized. It is patently erroneous to apply a 10-year maximum sentence provision to an offense for which a 15-year minimum sentence may be required. Clearly, the statute applicable to the offense simply failed to specify a maximum penalty.

The majority concedes that its result is obtained only because the trafficking provisions contain no separate, specified maximum penalty. However, the law is clear that "[t]he duration of imprisonment . . . when not regulated by statute, is subject to the sound discretion of the court, or the presiding judge." Kingsbery v. Ryan, 92 Ga. 108, 118 (17 SE 689). "The punishment can not be cruel, unusual, or excessive, but must be reasonable in view of the particular facts and circumstances." Brooks v. Sturdivant, 177 Ga. 514, 516 (170 SE 369). I have located no authority prohibiting the legislature from enacting a penal provision providing minimum punishment but leaving the maximum permissible sentence to the discretion of the trial court. Thus, the majority's concern about leaving without a cap the now defunct (see OCGA §16-13-31(f)) penalty provisions for trafficking in marijuana is unfounded.

IN THE SUPERIOR COURT OF COWETA COUNTY,

STATE OF GEORGIA

STATE OF GEORGIA	:	
		CASE NO. 4423, Page 235
Plaintiff	:	
		Coweta Superior Court
vs.	:	September, 1981
JON OLSON, GEORGE KEITH MCMURRAN AND DAVID GRIFFITH	:	
	:	
Defendants	:	

ORDER ON MOTION TO SUPPRESS

The above-styled case having come on regularly before this Court on Motion to Suppress Evidence filed by Defendants Olson and McMurran, and all parties having been heard, it is

HEREBY ORDERED AND ADJUDGED that the following evidence is hereby suppressed because said evidence was seized in violation of the United States and Georgia constitutions and the laws of the State of Georgia:

1.

All evidence, contraband or controlled substances as defined in any law of the State of Georgia or of

the United Snates and of any nature or of any type that resulted from the search and seizure of Defendant Olson's 1976 Dodge Van searched on or about September 3rd and 4th, 1981.

Said items include but are not limited to, any and all marijuana as defined by Section 79A of the Code of Georgia.

2.

All evidence, contraband or controlled substances as defined in any law of the State of Georgia or of the United States which was discovered as a result of the search of Defendant Olson's country residence designated House A in the Motion to Suppress hearing heretofore ordered upon.

Said items included but are not limited to, any and all marijuana as defined by Section 79A of the Code of Georgia.

3.

Any and all evidence of any nature or type that could or should be admitted against both Defendants, other than the controlled substances above-described which were recovered in or about the country residence designated House A, Defendant Olson's summer resi-

dence, in the Motion to Suppress.

The remainder of the Motion to Suppress is hereby denied.

SO ORDERED this 5th day of February, 1982.

William F. Lee, Jr. (Signature)
Judge, Superior Court
Coweta Judicial Circuit

THE COURT: Anybody else have anything else you want to say?

All right, this motion to suppress will be granted in part and denied in part. If you all would, I think the only way is to take an order that you might consent to, as to the form and I'll sign it.

Insofar as this order goes:

The motion to suppress is granted insofar as the substance found in the house that we have designated as house "A",* for the purpose of this hearing.

The motion to suppress is granted insofar as the substance that was seized in the search of the van.

The motion to suppress is denied insofar as the substance found in house "B"** and all other substances.

We've got house "B". We've got what was found under the cover. We've got what was found in the shed and what was found growing. What was in the shed and what was growing the witness testified was found after the consent. The motion is denied insofar as

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*House "A" was petitioner's residence.

**House "B" was an unoccupied house on petitioner's property; it is referred to as the "abandoned house" by the Court of Appeals (A-5).

that is concerned.

The motion is denied insofar as what was found in what we have designated as house "B".

The motion is denied as to what was found in the yard up under the plastic cover.

IN THE SUPERIOR COURT OF COWETA COUNTY

STATE OF GEORGIA

STATE OF GEORGIA, :

vs. : Criminal Indictment No. 4423 Page 235

JON OLSON, et al. :

MOTION TO SUPPRESS

The above-named Defendant, by and through his undersigned attorneys, respectfully moves this Court to suppress the following evidence seized as a result of a search of his automobile, home, curtilage, and surrounding property on or about the 3rd day of September, 1981, located in Coweta County, Georgia.

As grounds for the above motion, Defendant states that the search of his automobile, personal effects, home, and property, and seizure of certain alleged controlled substances was had and done pursuant to an illegal search warrant, attached hereto as Exhibit A and incorporated into this M]tion by reference, or without a warrant.

(1)

That Defendant was arrested and his automobile,

house, curtilage and property belonging to the Defendant was searched without an arrest warrant, without a valid search warrant, and without probable cause either to search or arrest Defendant: (a) In violation of the Fourth Amendment of the United States Constitution as the same is made applicable to the state of Georgia by virtue of the Fourteenth Amendment of the United States Constitution; (b) In violation of Article I, Section I, Paragraph X (Ga. Code Annotated §2-110) of the Constitution of the state of Georgia of 1976; and (c) In violation of Georgia Laws of 1966, Pages 567 through 572 (Ga. Code Annotated §27-301 through §27-314).

(2)

No exigent circumstances existed for police to invade the premises of Defendant Olson without a search warrant and any evidence resulting from said invasion must be suppressed.

(3)

Probable cause did not exist to believe that Defendant Olson when arrested had committed a crime. Therefore Olson's arrest was illegal and any evidence gained through a search of his automobile as an in-

cident of that arrest must be suppressed. Moreover, the questioning of said Defendant after the illegal arrest was illegal and all fruits of the search and statements made by Defendant must be suppressed.

(4)

The search of Defendant's automobile was not limited to the evidence related to way the initial arrest was made, but was unnecessarily broad and thereby illegal and all evidence confiscated as a result of said search must be suppressed.

(5)

The search warrant issued in this matter is defective and void on its face because it fails to particularly describe the place to be searched and fails to give a description sufficient to locate the place with reasonable certainty.

(6)

The search warrant in this case is void because it was issued in part by Ronnie Thompson, the investigating officer and affiant. Thompson is not a magistrate, nor is he neutral and detached as required by the Fourth Amendment to the United States Constitution.

(7)

The search warrant in this case is void and evidence gained from it must be suppressed because the issuance of the warrant was based upon information received by affiant from another police officer, who in turn received information from an informant whose reliability was not sufficiently established before the magistrate.

WHEREFORE, Defendant prays that this Motion to Suppress Evidence be inquired into by the Court; that the same be sustained; and that any and all evidence obtained or seized as described in the foregoing Motion be suppressed and ordered omitted from any trial against Defendant; and that all non-contraband evidence seized during such search be returned to Defendant.

This 5th day of January, 1982.

Howard J. Manchel (signature)
Kenneth Humphries (signature)
Michael G. Kam
Attorneys for Defendant Olson

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P.O. Box 220
Newnan, GA 30264
404-253-3282

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